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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/750,535	12/31/2003	Stephen Avedis Baratian	19392	5556

7590 12/30/2005

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EXAMINER

PIERCE, JEREMY R

ART UNIT	PAPER NUMBER
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1771

DATE MAILED: 12/30/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/750,535

Applicant(s)

BARATIAN ET AL.

Examiner

Jeremy R. Pierce

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 07 November 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-43, 46 and 48-59 is/are pending in the application.
- 4a) Of the above claim(s) 36-39, 42, 48-53, 55 and 56 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-35, 40, 41, 43, 46, 54 and 57-59 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 9/10/04, 4/26/05.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Response to Amendment

1. Applicant's amendment filed on November 7, 2005 has been entered. Claims 44, 45, and 47 have been cancelled. Claims 5, 7, 9, 11, 13, 15, 17, 19, 21, 31, 36, 40, 41, 43, 46, and 54 have been amended. New claims 57-59 have been added. Claims 1-43, 46, and 48-59 are currently pending. The Examiner notes that Applicant has listed claim 1 as "currently amended" in the amendment, but there does not appear to be any amendment to the claim. Claim 1 appears as though it should be listed with "original" as its status identifier. To expedite prosecution, the Examiner will allow the amendment to be entered. However, Applicant must make clear in the response to this Office Action whether an amendment to claim 1 was inadvertently omitted or whether the wrong status identifier was used.

Election/Restrictions

2. Applicant elects with traverse Group I, claims 1-35. In the amendment filed on November 7, 2005, Applicant amended claims 40, 41, 43, 46, and 54 from Group II so that they are now product claims instead of method claims. Therefore, these claims are now considered to be a part of Group I and will be examined in this Office Action. New claims 57-59 are also examined because they fall within elected Group I.

3. Claims 36-39, 42, 48-53, 55, and 56 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to nonelected Groups II and III, there

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being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on November 7, 2005. Applicant argued that the Restriction was in error and did not properly set forth evidence of distinctiveness nor offered reasons and analysis conforming to the proper requirements of MPEP § 806.05. However, this argument fails to address any of the reasons set forth in sections 2-4 of the Restriction requirement made in the Office Action dated October 7, 2005. Therefore, the restriction is maintained. Applicant has amended method claim 36 to depend from claim 1 for consideration of later rejoinder of the method claims. The Examiner will consider rejoinder upon allowance of the examined claims.

Claim Objections

4. Claim 13 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form.

Claim 13, which depends from claim 1, recites "the coalesced elastomeric stripes are in an add on amount of up to about 100.0 weight percent." This does not further limit claim 1 which recites the elastomeric stripes are present "between about 2.5 weight percent to about 100 weight percent of the composite web."

Claim Rejections - 35 USC § 102/103

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5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claims 1, 4-35, 40, 41, 43, 54, and 57-59 are rejected under 35 U.S.C. 102(b) as being anticipated by, or in the alternative, under 35 U.S.C. 103(a) as obvious over Morman (U.S. Patent No. 5,910,224).

Morman discloses applying an elastomeric precursor to a substrate and necking the substrate (column 5, lines 32-43). The substrate would be fluid permeable because it is formed from a porous nonwoven web (column 7, line 41). Morman discloses the elastomeric precursor is preferably applied in a pattern that extends across the fabric in a necked direction (column 7, lines 8-11) and show that this pattern may include a plurality of parallel elastomeric stripes (Figure 7). The entire composite of Morman will be fluid permeable since the porous substrate is not completely covered with elastomer

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(Figure 7). With regard to the claim limitation of an add-on amount of elastomer to be between 2.5 and 100 weight percent, Morman teaches the elastomer can be added in amount between 1 and 100 gsm and preferably between 5 and 20 gsm (column 6, lines 42-46). Morman also discloses the weight of the nonwoven substrate to be between 3.5 and 340 gsm (column 11, lines 39-42) with specific examples of the nonwoven substrate having weights of 17 gsm (column 16, lines 39-40) and 28.8 gsm (column 16, line 51). Using these weight ranges and their preferred embodiments, it is clear that Morman anticipate Applicant's broad range (i.e. 2.5 to 100%) of add-on amount of elastomeric material. In the alternative, the amount of elastomer provided added onto the substrate would affect the degree of elasticity of the final composite. It would have been obvious to a person having ordinary skill in the art at the time of the invention to provide elastomeric stripes in an add-on amount between 2.5 and 100 weight percent of the composite web, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233.

With regard to claims 4, 5, 7, 9, and 11, Applicant's limitations of various amounts of elastomer provided upon the substrate demonstrate a lack of criticality as to the amount of elastomeric material needed on the substrate. Therefore, the broad range of elastomeric material added onto the substrate taught by Morman (i.e. between 1 and 200 gsm) is sufficiently specific to anticipate Applicant's claimed narrower ranges, given the lack of criticality. Alternatively, narrowing the range of elastomer provided upon the substrate is simply matter of altering a result effective variable since the

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amount of elastomer applied to the substrate will directly affect the elasticity of the final product. It would have been obvious to a person having ordinary skill in the art at the time of the invention to provide greater amounts of elastomer when a more elastic final product was desired, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 205 USPQ 215.

With regard to claims 6, 8, 10, 12, and 29 the claimed property of modulus of elasticity is merely a direct result from the fact that different amounts of elastomer are provided onto the substrate. As set forth above, Morman anticipates or alternatively, renders obvious the claimed amounts of elastomeric material on the substrate. Also, Morman teaches using the same elastomeric materials, such as KRATON (column 12, lines 51-61), as Applicant teaches in the Specification (see page 11, line 30). Although Morman does not explicitly teach the limitation of modulus of elasticity, it is reasonable to presume that said limitations are inherent to the invention. Support for said presumption is found in the use of similar materials (i.e. similar styrene elastomer) and in the similar production steps (i.e. providing the elastomer in similar amounts onto a nonwoven web in a pattern of stripes) used to produce the composite web. The burden is upon the Applicant to prove otherwise. *In re Fitzgerald*, 205 USPQ 594. In the alternative, the claimed modulus of elasticities would obviously have been provided by the process disclosed by Morman as a matter of adjusting the result effective variable of the amount of elastomer. Note *In re Best*, 195 USPQ 433, footnote 4 (CCPA 1977) as

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to the providing of this rejection under 35 USC 103 in addition to the rejection made above under 35 USC 102.

With regard to claim 14, Morman teaches the spunbonded fabric may have a weight between 3.5 and 340 gsm (column 11, lines 39-42), and specifically teaches two weights of 0.5 osy (column 16, line 39) and 0.85 osy (column 16, line 51). Therefore, Morman anticipates a substrate weighing 0.6 osy. Alternatively, it would have been obvious to a person having ordinary skill in the art at the time of the invention to provide a fabric weighing 0.6 osy, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. With regard to claims 15, 17, 19, and 21, similar reasoning with respect to claims 4, 5, 7, 9, and 11 rejected above applies. With regard to claims 16, 18, 20, and 22, similar reasoning with respect to claims 6, 8, 10, and 12 rejected above applies.

With regard to claim 23, the spunbonded fabric of Morman may be made of polypropylene (column 11, lines 5-27). With regard to claims 24 and 54, Morman teaches a spunbonded fabric is necked from an original width of 130 inches down to a final width of 72 inches (column 17, lines 14-22). This equals a percent neck of about 45%.

With regard to claims 25-28 and 30, Applicant claims various property values for first cycle hysteresis, second cycle hysteresis, first cycle immediate set, second cycle immediate set, and fluid intake time. However, these property values are merely the result of the claimed product, which has shown to be anticipated by Morman. Although

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Morman does not explicitly teach the limitations of first cycle hysteresis, second cycle hysteresis, first cycle immediate set, second cycle immediate set, and fluid intake time, it is reasonable to presume that said limitations are inherent to the invention. Support for said presumption is found in the use of similar materials (i.e. spunbonded polypropylene fabric bonded to a styrene elastomeric layer) and in the similar production steps (i.e. providing the elastomer in similar amounts onto a nonwoven web in a pattern of stripes) used to produce the composite web. The burden is upon the Applicant to prove otherwise. In the alternative, the claimed modulus of elasticities would obviously have been provided by the process disclosed by Morman as a matter of adjusting the result effective variable of the amount of elastomer or by altering the type of fabric used (column 11, lines 5-43) or the type of elastomer used (column 12, lines 1-62).

With regard to claim 31, Morman discloses using styrene block copolymers (column 12, lines 32-50). With regard to claim 32, Morman uses a necked nonwoven web (column 5, lines 32-43).

With regard to claim 33, this independent claims recite a combination of limitations already addressed individually above and is anticipated by or alternatively, obvious over Morman for the same reasons. Similar reasoning applies for claims 34 and 35.

With regard to claims 40 and 41, these claims limit the product claim by reciting various processing steps for forming the elastomeric stripes. "[E]ven though product-by-process claims are limited by and defined by the process, determination of

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patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985). Whether the elastomeric stripes are formed by electrospun fiber (claim 40) or droplets (claim 41), the resulting product must have the claimed structure of a substrate having elastomeric stripes bonded to it. No definable product limitations are set forth in these processing steps because no character is given to the nature of the electrospun fibers or droplets in the claims.

With regard to claim 43, Morman teaches the elastomeric precursor may be applied by evaporation from a solvent (column 4, lines 65-66). With regard to claim 57, Morman discloses the elastomer may be coalesced (column 12, line 35). With regard to claims 58 and 59, while each individual stripe may not be fluid permeable, the collection of stripes is fluid permeable as a group because they are spaced apart from one another.

8. Claims 1, 4-23, 25-31, 33-35, 43, 46, and 57-59 are rejected under 35 U.S.C. 102(e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Desai et al. (U.S. Patent Application Publication 2003/0088228).

Desai et al. disclose an extensible fibrous substrate combined with a plurality of elastomeric members disposed on the substrate (paragraph 10). The substrate is formed from various fibrous materials known to be fluid permeable (paragraph 38). The elastomeric members may be applied in a pattern of parallel stripes (paragraph 37),

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thus allowing the entire composite to remain fluid permeable. With regard to the claim limitation of an add-on amount of elastomer to be between 2.5 and 100 weight percent, Desai et al. teach the elastomer can be added in amount between 5 and 200 gsm and preferably between 50 and 100 gsm (paragraph 48). Desai et al. also disclose an example wherein the weight of the substrate is 22 gsm (paragraph 107). Using the weight ranges for the amount of elastomer and the weight of the substrate, it is clear that Desai et al. anticipate Applicant's claimed range of add-on amount of elastomeric material. In the alternative, the amount of elastomer provided added onto the substrate would affect the degree of elasticity of the final composite. It would have been obvious to a person having ordinary skill in the art at the time of the invention to provide elastomeric stripes in an add-on amount between 2.5 and 100 weight percent of the composite web, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233.

With regard to claims 4, 5, 7, 9, and 11, Applicant's limitations of various amounts of elastomer provided upon the substrate demonstrate a lack of criticality as to the amount of elastomeric material needed on the substrate. Therefore, the broad range of elastomeric material added onto the substrate taught by Desai et al. (i.e. between 5 and 200 gsm) is sufficiently specific to anticipate Applicant's claimed narrower ranges, given the lack of criticality. Alternatively, narrowing the range of elastomer provided upon the substrate is simply matter of altering a result effective variable since the amount of elastomer applied to the substrate will directly affect the

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elasticity of the final product. It would have been obvious to a person having ordinary skill in the art at the time of the invention to provide greater amounts of elastomer when a more elastic final product was desired, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 205 USPQ 215.

With regard to claims 6, 8, 10, 12, and 29 the claimed property of modulus of elasticity is merely a claimed result from the fact that different amounts of elastomer are provided onto the substrate. As set forth above, Desai et al. anticipate or alternatively, render obvious the claimed amounts of elastomeric material on the substrate. Also, Desai et al. teach using the same elastomeric materials, such as KRATON (paragraph 40), as Applicant teaches in the Specification (see page 11, line 30). Although Desai et al. do not explicitly teach the limitation of modulus of elasticity, it is reasonable to presume that said limitations are inherent to the invention. Support for said presumption is found in the use of similar materials (i.e. similar styrene elastomer) and in the similar production steps (i.e. providing the elastomer in similar amounts onto a nonwoven web in a pattern of stripes) used to produce the composite web. The burden is upon the Applicant to prove otherwise. *In re Fitzgerald*, 205 USPQ 594. In the alternative, the claimed modulus of elasticities would obviously have been provided by the process disclosed by Desai et al. as a matter of adjusting the result effective variable of the amount of elastomer. Note *In re Best*, 195 USPQ 433, footnote 4 (CCPA 1977) as to the providing of this rejection under 35 USC 103 in addition to the rejection made above under 35 USC 102.

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With regard to claim 14, the 22 gsm substrate taught by Desai et al. (paragraph 107) would equal about 0.6 osy. With regard to claims 15, 17, 19, and 21, similar reasoning with respect to claims 4, 5, 7, 9, and 11 rejected above applies. With regard to claims 16, 18, 20, and 22, similar reasoning with respect to claims 6, 8, 10, and 12 rejected above applies. With regard to claim 23, the substrate may be made from polypropylene (paragraph 28) and may be spunbonded (paragraph 27).

With regard to claims 25-28 and 30, Applicant claims various property values for first cycle hysteresis, second cycle hysteresis, first cycle immediate set, second cycle immediate set, and fluid intake time. However, these property values are merely the result of the claimed product, which has shown to be anticipated by Desai et al. Although Desai et al. do not explicitly teach the limitations of first cycle hysteresis, second cycle hysteresis, first cycle immediate set, second cycle immediate set, and fluid intake time, it is reasonable to presume that said limitations are inherent to the invention. Support for said presumption is found in the use of similar materials (i.e. spunbonded polypropylene fabric bonded to a styrene elastomeric layer) and in the similar production steps (i.e. providing the elastomer in similar amounts onto a nonwoven web in a pattern of stripes) used to produce the composite web. The burden is upon the Applicant to prove otherwise. In the alternative, the claimed modulus of elasticities would obviously have been provided by the process disclosed by Desai et al. as a matter of adjusting the result effective variable of the amount of elastomer or by altering the type of fabric used (paragraph 27) or the type of elastomer used (paragraph 40).

With regard to claim 31, Desai et al. disclose using styrene block copolymers (paragraph 40).

With regard to claim 33, this independent claims recite a combination of limitations already addressed individually above and is anticipated by or alternatively, obvious over Desai et al. for the same reasons. Similar reasoning applies for claims 34 and 35.

With regard to claims 40 and 41, these claims limit the product claim by reciting various processing steps for forming the elastomeric stripes. "[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985). Whether the elastomeric stripes are formed by electrospun fiber (claim 40) or droplets (claim 41), the resulting product must have the claimed structure of a substrate having elastomeric stripes bonded to it. No definable product limitations are set forth in these processing steps because no character is given to the nature of the electrospun fibers or droplets in the claims.

With regard to claim 43, Desai et al. teach the elastomeric precursor may be applied by evaporation from a solvent (paragraph 42). With regard to claim 46, Desai et al. teach the coverage area of the elastomer may be between 10 and 80% (paragraph 48). With regard to claim 57, Desai et al. teach the elastomer may be coalesced from

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elastomeric precursors (paragraph 45). With regard to claims 58 and 59, while each individual stripe may not be fluid permeable, the collection of stripes is fluid permeable as a group because they are spaced apart from one another.

Claim Rejections - 35 USC § 103

9. Claims 2, 3, 40, and 46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Morman in view of Mleziva et al. (U.S. Patent No. 6,057,024).

Morman teaches that the amount of elastomer applied to the substrate can be a great range and many methods can be used in applying it (column 6, lines 42-63). Morman does not teach any specific width of the elastomeric stripes or spacing between the elastomeric stripes. Mleziva et al. disclose a composite elastic material that also comprises an extensible substrate and elastomeric stripes (Abstract). Mleziva et al. teach that smaller amounts of elastomeric material may be supplied to the substrate using elastomeric spun filaments (column 10, lines 44-53). These filaments may have a width between 0.0025 and 0.25 inches (column 10, line 48). Mleziva et al. disclose the filaments may be present from about 2 to about 240 filaments per inch of material (column 12, lines 55-65). Thus, Mleziva et al. provide a broad range of stripe width and stripe spacing for the elastomeric material. It would have been obvious to a person having ordinary skill in the art at the time of the invention to provide a pattern of 1 mm wide stripes (claim 2) or 4 mm wide stripes (claim 3) spaced apart 1 cm from each other in order to provide a low amount of elasticity to the composite material since Morman discloses that low basis weight sheets are desirable (column 6, lines 46-47) and Mleziva

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et al. teach such dimensions are known in the art, and since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 205 USPQ 215. With regard to claim 40, using the method of Mleziva et al. to provide the elastomeric stripes in Morman would be akin to using elastomeric fibers as the stripes. With regard to claim 46, using the claimed thicknesses and spacing of the stripes from claims 2 and 3 would inherently meet the limitation of claim 46.

Conclusion

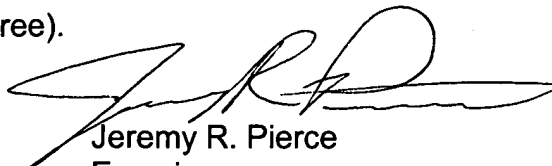
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jeremy R. Pierce whose telephone number is (571) 272-1479. The examiner can normally be reached on normal business hours, but works flextime hours.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached on (571) 272-1478. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should

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you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

A handwritten signature in black ink, appearing to read 'Jeremy R. Pierce', is positioned above the printed name.

Jeremy R. Pierce

Examiner

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December 22, 2005